PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Hemphill*, 2018 NSPC 84

Date: 20180307
Docket: 8141652
Registry: Pictou

Between:

Her Majesty the Queen

v.

Eric Scott Hemphill

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	7 March 2018 in Pictou, Nova Scotia
Charge:	Para. 78(a) *Fisheries Act*
Counsel:	Wayne J. MacMillan for the Public Prosecution Service of Canada Joel Sellers for Eric Scott Hemphill

By the Court:

[1] Eric Scott Hemphill has been a fisher for over forty years.

[2] In June 2017, he held a licence for the Atlantic lobster fishery. This licence carried with it a number of operational conditions. Two key conditions restricted Mr. Hemphill's fishery to Lobster Fishing Areas 26A-1 and 26A-3 during the 2017 open season.

[3] On 7 June 2017, officers of Fisheries and Oceans Canada found that Mr. Hemphill had set 2 lines of lobster traps outside of the areas where his licences authorized him to fish. In total there were 10 illegal traps, located at distances ranging from 233 metres to 208 metres outside of the authorized area.

[4] Two years earlier, 27 June 2015, officers had discovered Mr. Hemphill's lobster gear set approximately 181 metres outside of his authorized area. Mr. Hemphill was issued a warning.

[5] On 3 and 7 June 2016 officers located Mr. Hemphill's lobster gear beyond his authorized area; he was given a second warning, and was told by officers that it would be the last. Mr. Hemphill asserted that he was not outside his authorized area. It appears that the officer who dealt with Mr. Hemphill advised him that he

needed to make an adjustment to his navigational equipment to ensure it would display correctly his position at sea.

[6] Mr. Hemphill has not asserted a due-diligence defence. Rather, he has pleaded guilty.

[7] The prosecution seeks the imposition of a fine in the range of $2500. Although the prosecution sought initially a forfeiture of the gear seized from Mr. Hemphill in accordance with sub-s. 72(1) of the *Fisheries Act*, the prosecution abandoned that application in correspondence to the court dated 25 January 2018.

[8] Defence counsel seeks the imposition of a fine in the range of $750; the issue of gear forfeiture is no longer controversial, as the prosecution has agreed that it be returned.

[9] Section 78 of the *Fisheries Act* states:

> 78 Except as otherwise provided in this *Act*, every person who contravenes this *Act* or the regulations is guilty of
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> (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding one hundred thousand dollars and, for any subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both; or
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> (b) an indictable offence and liable, for a first offence, to a fine not exceeding five hundred thousand dollars and, for any subsequent offence, to a fine not exceeding

> five hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both.

[10] This charge was prosecuted summarily, so that para. 78(a) of the *Act* applies.

[11] There is no evidence before the court that Mr. Hemphill benefitted monetarily from the offence; accordingly, the additional-fine provision in s. 79 of the *Act* is inapplicable.

[12] The prosecution has not sought any ancillary orders under s. 79.2 of the *Act*.

[13] There is no evidence before the court that lobster were found in the gear seized from Mr. Hemphill; therefore, there is no catch-forfeiture issue under sub-s. 72(2) of the *Act*.

[14] In *R. v. Morash*, [1994] N.S.J. No. 53, a case which dealt with an offender with a record for fishing violations who had set a gill net during closed season, the Court of Appeal addressed the principles of sentencing to be considered in fisheries cases:

> In 1991 Parliament increased the maximum fines for summary conviction offences under s. 78(a) of the Fisheries Act from $5,000 to $100,000. This is a clear indication that Parliament viewed as serious the need to curtail illegal fishing off the east coast of Canada. The amount of the fine imposed is reasonable. Furthermore, it is quite common for judges imposing sentences for violation of the Fisheries Act to impose forfeiture of the sales proceeds of catches; this is provided for in the Act as is the right of a sentencing judge to impose suspensions on licenses. I agree with the comments of counsel for the respondent where he states:

> ...the fishing industry is self-enforcing. Fisheries & Oceans has neither the manpower nor the time to inspect the fishing activities of all fishers. Those who do act within the law have a right to expect that those who do not do so will be sanctioned in such a way as to make compliant behaviour the only reasonable and practical option. Fines alone cannot do this. They can too easily become a mere cost of doing business. *Licence sanctions, on the other hand, strike at the very heart of the wrongdoers privileged positions.* [Emphasis added.]

[15] Although the Court of Appeal was dealing with an offender whose offence and moral culpability far exceeded the circumstances evident in the facts of this case, it is clear that the Court considered licensing suspensions as normal ancillary orders accompanying the imposition of fines. The prosecution has demonstrated considerable restraint in not seeking a licence suspension in this case.

[16] In *R. v. MacKinnon*, [1996] N.S.J. No. 405, the Supreme Court, on a summary-conviction appeal from sentence brought by the prosecution, dealt with an offender who had pleaded guilty to failing to have a fishery observer on his vessel. The sentencing judge had imposed a $1500 fine; the prosecution argued on appeal that a lower-level fine was inadequate given the respondent's significant record, and given cogent evidence of deliberation and deception. The summary-conviction-appeal-court judge increased the fine to $7500. The court in *MacKinnon* was dealing with an offence far more serious and an offender far more culpable than in this case; however, in varying the sentence as it did, the court identified a number of principles of general application:

12 Deterrence: In dealing with regulatory offenses, courts have traditionally viewed deterrence as the predominant factor in sentencing. In the case of *R. v Grandy and Bell* (1992) 113 N.S.R.(2d) 85 at 88 the Crown appealed sentences that were imposed on two accused after t under the Fisheries Act for fishing without a license and possession of untagged salmon. Considering the Crown's appeal, Chief Judge Palmeter (as he then was) commented on the importance of general deterrence within the context of *Fisheries Act* offenses:

> "Cases cited to the Court would indicate that in the context of regulatory offenses in general and particularly relating to offenses under the *Fisheries Act* and Regulations, and other Acts dealing with the fishing industry, general deterrence is the paramount and over-riding principle to be considered in imposing sentence. This is certainly applied in sentences imposed by our Courts in Canada under the *Coastal Fisheries Protection Ac*t. Although this is different legislation our courts have recognized that deterrence both general and specific, is the most important factor to be considered for the purpose of protecting our fishery resource. I agree with counsel that this proposition is as applicable, if not more applicable to the severely threatened salmon stocks in Nova Scotia."

13 In *R. v Ross* (1990) 96 N.S.R.(2d) 444 at 446 (N.S. Co. Crt.), Judge Freeman (as he then was) quoted extensively from the Supreme Court of Canada decision in *Thompson Newspapers Limited v Director of Investigation and Research, Combines Investigation Act, et al*, (1990) 106 N.R. 161 (S.C.C.) and focused on Justice LaForest's remarks with respect to deterrence and regulatory offenses:

> "... a regulatory offense is not primarily concerned with values, but with results. While values necessarily underlie all legal prescriptions, the regulatory offense really gives expression to the view that it is expedient for the protection of society and for the orderly use and sharing of society's resources that people act in a prescribed manner in prescribed situations, or that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance with rules for the overall benefit of society."

14 Judge Freeman emphasizes the importance of deterrence within the context of *Fisheries Act* offenses and again quotes with approval from the *Thompson* decision:

> "As an alternative to regular or periodic and unannounced inspection as a means of achieving behaviour modification, the approach in competition law has been to provide for penalties, capable of counter-balancing the incentive to flout the law which a low expectation of detection might otherwise produce."

15 In her submission before me, Crown Counsel referred to the vast size of the fishing fleet and the consequent extreme difficulty in enforcing fisheries regulations. She also referred to the danger of depletion of a resource which

should be available for the benefit of the community at large. The principle outlined by Judge Freeman is particularly germane in such a context. The effects of violations such as that under examination here have wide ramifications for society. Observers are deployed on fishing vessels to ensure that those engaged in the fishery obey the rules. The deployment of observers is primarily a conservation and not a mere administrative measure. In her submission to the Learned Provincial Court Judge, Crown Counsel stated the following:

> "... Observers are deployed on fishing vessels for conservation reasons to monitor fishing activities, to examine and measure fishing gear, to record scientific data, to collect and sample fish, to also report on areas fished, to provide some reports on the dumping of fish, checking for undersized fish and that sort of thing. And, Fisheries and Oceans uses that information to assist in the management of the fishery. So in areas such as closed areas with a high concentration of small fish or where there are high bi-catches of a restricted species, observers are used in this manner to simply record what's going on in the fishery and to keep an eye on the resource."

16 I agree with those remarks. Compliance with the observer program is an essential conservation measure. Non-compliance should be equated with illegal fishing because obviously that is what the absence of observers could permit.

17 The principle of specific deterrence is rooted in the notion that legal sanctions will serve to discourage the same offender from re-offending. In sentencing an accused, the court should balance the need for general deterrence to others, with the need for a specific deterrence for the accused. [*R. v Morrissette* (1970) 1 C.C.C.(2d) 307 (Sask. C.A.)].

18 The need for penalties which strongly encourage statutory compliance are of particular importance within the context of regulatory offenses such as those under the *Fisheries Act*. In such cases, natural resources are in danger of being depleted or destroyed and thus the effects of such violations have wide ramifications for society. Given the difficulties involved in enforcing Fisheries legislation and the expense involved in protecting the resource, it is extremely important for courts to do their utmost to encourage compliance with the legislation.

19 A fine must be substantial enough that it will send a message to the public that illegal activities will not be tolerated by the courts. The amount of the fine should take into consideration both the seriousness of the offense and the general principles of sentencing. [*R. v K-Mart Canada Limited* (1982) 28 C.R.(3d) 271 (Ont. C.A.)]. A fine should not be so low that it will be seen as a license fee or as a mere cost of doing business. A low monetary penalty may also be considered an affront to those, the majority, who do comply with the Act.

20 Conclusion: I have concluded that the fine imposed by the Learned Provincial Court Judge was clearly inadequate in relation to the offence proven and to the record of the accused. The sentence was therefore manifestly unfit.

> 21 Offenses under section 78 of the Fisheries Act are strict liability offenses. In other words, while intentional violation can be an aggravating factor, intention is not requisite for a conviction. The question of intention obviously became the focus of the sentencing hearing. *The Crown should have reminded the sentencing judge that even if Mr. MacKinnon's violation was unintentional, his lack of due diligence was nevertheless a very serious transgression.* [Emphasis added].

[17] Furthermore, the Court observed:

> 22 The Learned Provincial Court Judge also failed to give sufficient weight to the principle of specific deterrence. As noted, Mr. MacKinnon had three prior convictions for refusing to take an observer. The last conviction dated September 28, 1990, resulted in a fine of $3,500.00. The present violation took place only four and one half years after his last conviction. That gap in time, while deserving some consideration, should not be over-emphasized. The prior convictions and the latter $3,500.00 fine had obviously not made the desired impression upon Mr. MacKinnon.
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> 23 I would therefore set aside the sentence of the Learned Provincial Court Judge. Mr. MacKinnon will pay a fine of $7,500.00 on or before March 31, 1997. In default, he will be incarcerated for a period of 120 days.

[18] As is clear from this extract, *MacKinnon* identifies in fisheries-sentencing cases general deterrence and specific deterrence as factors in common with those found in ss. 718-718.2 of the *Criminal Code*. *R. v. Oldford*, 2005 NLTD 38 at para. 32 reviewed the sentencing-principles congruency between the *Fisheries Act* and the *Criminal Code*:

> The *Fisheries Act* and regulations create quasi-criminal offences but appropriate allowances must be made for the distinctive public interests that are protected by the legislation. Nevertheless, courts must be cognizant that the principles of sentencing do apply and must strive to achieve the balance and synergy of a fit sentence. This calls for considering proportionality, weighing the mitigating and aggravating factors and taking the special circumstances of the offender into account.

[19] This would bring into play as well the principle of sentencing parity, as in para. 718.2(b) of the *Code*. Parity is important in any penalty regime based on the principle of legality, as it allows rational decision-makers to judge with a good degree of predictability the consequences of offending conduct and, presumably, to be deterred by the risk of penalty.

[20] Since 2010, the fines imposed in this judicial centre for fisheries violations at lower levels of seriousness and culpability have been in the $750-$1000 range: the cases cited most often are *R. v. Brown* (19 Oct. 2015), Pictou 2904322 (Prov. Ct.) a fine of $1000, and *R. v. Brown* (10 April 2017), Pictou 8082111, a fine of $750. There is no reason evident to the court to depart from that range in this case. I have considered Mr. Hemphill's guilty plea, his lack of prior record, the fact that his violation arose from the inattentive use of his navigational aid rather than a deliberate attempt to evade his fishing-area licensing condition; however, I have taken into account the fact that he had received two warnings in the years leading up to this charge as elevating this offence to the upper level of the typical range. I must exercise restraint in this regard, as Mr. Hemphill is not to be punished for uncharged offences; however, the fact that he had been warned makes his neglect in not checking the accuracy of his navigational data inputs more serious. In my view, a fine of $1000 is in line with established precedent in this area, and

consistent with the principles of proportionality and deterrence. It is significant that the statute does not prescribe a mandatory-minimum penalty. The court will allow 6 months for payment. Victim surcharges are not exigible under the *Fisheries Act*.

[21] I wish to thank counsel for their very thorough submissions.

JPC